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CONSTITUTIONALITY OF THE FEDERAL EMPLOYERS' LIABILITY ACT. — In pursuance of the recent policy of exploiting the long unexercised power "to regulate commerce . . . among the several states,"[1] Congress last year passed the Federal Employers' Liability Act, providing that "every common carrier engaged in trade or commerce . . . between the several states . . . shall be liable to any of its employees or in case of his death to his personal representative . . . for all damages which may result from the negligence of any of its officers, agents or employees . . ."[2] Almost simultaneously this statute has been held unconstitutional by two federal circuit courts. *Brooks* v. *Southern Pac. Co.*, 148 Fed. Rep. 986 (Circ. Ct., W. D. Ky.); *Howard* v. *Illinois Cent. R. R. Co.*, 148 Fed. Rep. 997 (Circ. Ct., W. D. Tenn., W. D.). Each court rested its decision primarily on the ground that the Act is not a regulation of interstate commerce within the constitutional powers of Congress; though each gave the alternative reason that even if the Act does so regulate interstate commerce, it also, by its terms, regulates purely intrastate commerce and constitutes one inseparable whole. The latter objection is merely verbal and easily avoidable. The former objection raises a question fundamentally important and embarrassingly difficult. The answer to it seems indicated by practically no authority even approximately in point; for the former disinclination of Congress to exercise its interstate commerce powers has allowed few adjudications on their scope. The Safety Appliance Act,[3] the constitutionality of which seems to have been acquiesced in but not directly adjudged by the United States Supreme Court,[4] is a regulation as to cars actually moving interstate traffic, to secure the safety of employees and travellers on interstate journeys, — a very different sort of act from the one now in question.

[1] U. S. Const., Art. 1, § 8, cl. 3. See also cl. 18.
[2] 34 Stat. at L. 232, 233.
[3] 27 Stat. at L. 531, 532.
[4] Johnson *v.* Southern Pacific Co., 196 U. S. 1.

The constitutionality of the National Arbitration Act seems to have been passed upon only by the same judge who decided the first of the present cases.[5] Moreover, decisions as to the validity of state statutes regulating incidents of interstate commerce, in the absence of congressional action,[6] and as to the power of Congress over foreign commerce,[7] have little value in determining the precise limits of Congress' interstate commerce power. These limits, therefore, can be discovered only by ascertaining from general considerations what is interstate commerce and what constitutes a regulation of it.

Interstate commerce, said Judge Field, "comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities . . . between citizens of different states." [8] Now the trafficking of a common carrier in the labor of its employees is certainly not interstate commerce.[9] Consequently, if the present enactment be a regulation of commerce, it is so because it indirectly regulates the transportation or transit of persons or property between the states.[9] Undoubtedly Congress may indirectly regulate interstate commerce by regulating its instrumentalities.[10] On the other hand the power does not "apply to all the incidents to which the commerce might give rise and to all contracts which might be made in the course of its transaction," [11] nor to its instrumentalities except as affecting the interstate commerce itself; [12] for then that power would be made to "embrace the entire sphere of mercantile activity in any way connected with trade between the states." [11] Betwixt these two clear extremes there lies a shadowy region of doubt. "The precise limit of the power of Congress . . . cannot be determined by the application of technical or definite rules. The question can often be solved only by considering the true spirit and purpose of the Constitution and the practical results of the legislation in question." [13] It is accordingly important to bear in mind the fact that the interstate commerce power was granted to secure an interstate commerce unobstructed by invidious distinctions arising from local interests, and subject only to uniform regulations.[14] Judged by these considerations, the act in question seems wanting. It does not directly regulate interstate commerce; it does not regulate an instrumentality in a particular bearing substantially on interstate commerce; it subserves no object sought through the interstate commerce clause. How can it fairly be said to render interstate transportation or transit safer or better? On the contrary, the whole scope and spirit of the law makes it transparent that the enactment actually results, and was designed to result,

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[5] See RECENT CASES, p. 499.

[6] See Peirce *v.* Van Dusen, 78 Fed. Rep. 693, 698.

[7] See Prentice, Fed. Power over Carriers and Corp., 48, 221.

[8] See Welton *v.* State of Missouri, 91 U. S. 275, 280. See also Hopkins *v.* United States, 171 U. S. 578, 597. *Cf.* Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 189 (*per* Marshall, C. J.), 229 (*per* Johnson, J., concurring); Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 203.

[9] See County of Mobile *v.* Kimball, 102 U. S. 691, 702.

[10] See Welton *v.* State of Missouri, *supra*; Sherlock *v* Alling, 93 U. S. 99, 103; Gloucester Ferry Co. *v.* Pennsylvania, *supra*; United States *v.* E. C. Knight Co., 156 U. S. 1, 13; Hopkins *v.* United States, *supra*.

[11] See Hooper *v.* California, 155 U. S. 648, 655; Williams *v.* Fears, 179 U. S. 270, 278. See also Sherlock *v.* Alling, *supra*.

[12] See Northern Securities Co. *v.* United States, 193 U. S. 197, 402 (*per* Holmes, J., dissenting).

[13] See 17 HARV. L. REV. 536.

[14] See Veazie *v.* Moore, 14 How. (U. S.) 568, 574.

in a regulation not of interstate commerce but of another subject which Congress is not empowered to regulate, — the liabilities of employer to employee.

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EFFECT OF LAPSE ON EXECUTORY GIFTS OTHERWISE ILLEGAL. — An executory devise or bequest cannot take effect unless the precise contingency happen upon which it is conditioned. Divestiture must be by the testator's express authority, and if the appointed contingency do not happen, lapse of the preceding interest is not enough.[1] The contingency may, however, be such as to be contained in such a lapse. For instance, a gift over if A die under twenty-one takes effect if A, during his minority, predecease the testator.[2] An executory gift must also run a second gauntlet. Though adequately satisfying the testator's intention as declared in his will, it may yet fall foul of some collateral rule of law. Since a will is ambulatory and without legal significance till the testator's death,[3] that would seem the sensible period to look to in order to determine whether its provisions are obnoxious. The law takes no wanton pleasure in thwarting the intention of testators. Accordingly, if the presence of a preceding interest is the sole objection to the legality of a gift, failure of that interest before the testator's death should remove all taint of illegality.

The rule against perpetuities adopts this sane view. A gift, too remote at the writing of the will, nevertheless stands if by lapse of preceding interests it is at the testator's death no longer too remote.[4] An analogous case presents itself where a life interest is given in a consumable chattel. The nature of the property is such that a life interest carries the entire ownership, and a gift over thereafter must normally fail. But if the life interest lapse, the objection disappears. An English case, however, holds otherwise.[5] Similarly where a fee is given in land or an absolute interest in personalty, a gift over in the event that the first taker die intestate, or not having parted with it in his lifetime, is bad, because a real or fancied restraint upon the preceding gift.[6] If, however, by lapse there is at the testator's death no preceding interest that can be illegally intrenched upon, all reason again vanishes for invoking a collateral rule of law to foil the testator. And so the American cases hold.[7] Two English cases[8] to the contrary have been disapproved,[9] but not overruled.

A Missouri court has recently passed upon this question without reference to the adjudged law or its analogies. A testator gave his brother money, directing that any remainder at his death be divided between two nieces. The brother predeceased the testator. The court declared that the testator had given expression to two irreconcilable purposes, the first of

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[1] Tarbuck *v.* Tarbuck, 4 L. J. Ch. 129.

[2] Mathis *v.* Hammond, 6 Rich. Eq. (S. C.) 121; Wager *v.* Wager, 96 N. Y. 164. *Cf.* Jones *v.* Westcomb, 1 Eq. Cas. Abr. 245, pl. 10; Avelyn *v.* Ward, 1 Ves. Sr. 420. See 2 Jarman, Wills, 6 ed., 760–768.

[3] Lomax *v.* Holmden, 1 Ves. Sr. 290.

[4] *In re* Lowman, [1895] 2 Ch. 348. See Gray, Rule Perp., § 231.

[5] Andrew *v.* Andrew, 1 Coll. 686.

[6] See Gray, Restraints on Alien., §§ 56, 57, 74 a; 17 HARV. L. REV. 190.

[7] Burbank *v.* Whitney, 24 Pick. (Mass.) 146; Crozier *v.* Bray, 39 Hun (N. Y.) 121. See Eaton *v.* Straw, 18 N. H. 320, 333.

[8] Hughes *v.* Ellis, 20 Beav. 193; Greated *v.* Greated, 26 Beav. 621.

[9] *In re* Stringer's Estate, 6 Ch. D. 1, 15. But *cf.* 2 Jarman, Wills, 6 ed., 19.